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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-5935

ROOSEVELT GREEN,

Petitioner,

-v-

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to effective assistance of counsel at his trial, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. Whether Petitioner was denied his right to due process of law, equal protection of the law, meaningful access to the courts and compulsory process, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by the denial by the State Habeas Corpus Court of Petitioner's Motion for Funds for expert assistance.

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IN THE

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No. 81-

ROOSEVELT GREEN,	)
	)
Petitioner,	)
	)
-v-	)
	)
WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

Petitioner prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia, entered on September 18, 1981. Application for Certificate of Probable Cause to Appeal was denied by the Supreme Court of Georgia on November 5, 1981.

CITATIONS TO OPINIONS BELOW

The unreported opinion of the Superior Court of Butts County, Georgia and the Order of the Georgia Supreme Court are set out in Appendices "A" and "B" respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County, Georgia, was sought in the Supreme Court

of Georgia pursuant to Ga. Code Ann. §24-4526. Review was finally denied on November 5, 1981. Pursuant to Rule 20 of the Rules of this Court, the time for this petition runs from the denial of review issued by the Supreme Court of Georgia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions which are set out in Appendix "C" hereto.

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to effective assistance of counsel at his trial, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. Whether Petitioner was denied his right to due process of law, equal protection of the law, meaningful access to the courts and compulsory process, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by the denial by the State Habeas Corpus Court of Petitioner's Motion for Funds for expert assistance.

HOW THE ISSUES WERE RAISED BELOW

1. Petitioner's state Petition for Writ of Habeas Corpus raised the issue of the effective assistance of Petitioner's trial counsel. The habeas court found this allegation to be without merit. The constitutional issue was again raised on appeal to the Supreme Court of Georgia which affirmed the judgment of the state habeas corpus court.

2. Prior to the hearing on Petitioner's state Petition

for Writ of Habeas Corpus, Petitioner moved the habeas corpus court to provide necessary funds for expert assistance, including an investigator. The Court denied the motion, specifically stating that it had no authority to grant such a motion. The constitutional issues were raised in an appeal to the Supreme Court of Georgia which affirmed the judgment of the habeas corpus court.

STATEMENT OF THE CASE

1. On January 28, 1978, Petitioner was convicted in the Superior Court of Monroe County, Georgia, of murder and was sentenced to death.

2. The conviction and sentence of death were affirmed by the Supreme Court of Georgia in Green v. State, 242 Ga. 261 (1978).

3. Petitioner then filed a Petition for Writ of Certiorari in this Court which was granted, and on consideration of the issues this Court reversed the judgment of the Georgia Supreme Court as to the sentencing phase of the trial. Green v. Georgia, 442 U.S. 95 (1979).

4. On November 1, 1979, Petitioner was again tried in the Superior Court of Monroe County, Georgia, and was again sentenced to death by a jury. The Supreme Court of Georgia affirmed the re-sentencing in Green v. State, 246 Ga. 598 (1980).

5. Petitioner applied to this Court for a Writ of Certiorari to this Court on December 30, 1980. His application was denied on February 23, 1981, and an Application for Rehearing, filed on March 20, 1981, was denied.

6. Petitioner then filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on June 11, 1981. A hearing was held on August 10, 1981, in the Superior Court of Butts County, Georgia, and his petition

was denied on September 18, 1981.

7. Petitioner then filed an Application for Certificate of Probable Cause to Appeal which was denied by the Supreme Court of Georgia.

8. During the hearing on Petitioner's state habeas corpus petition, Petitioner submitted evidence that his trial counsel, Richard Milam, prior to Petitioner's re-sentencing trial, filed a Motion for Funds to represent and defend Petitioner adequately on his retrial. The trial court awarded Petitioner's counsel the sum of five hundred dollars ($500.00) to prepare the case. Mr. Milam testified during the habeas hearing that, although he knew that Petitioner had grown up in the states of Alabama and New York, that due to a lack of funds, no effort was made to investigate in the states in which Petitioner was raised for evidence in mitigation or witnesses who could testify as to Petitioner's character or background.

9. Prior to his state habeas corpus hearing, Petitioner moved for funds for expert assistance. Among the requests, Petitioner requested funds to procure the services of an investigator to search for available mitigating evidence which could have been presented during his re-sentencing trial, had his counsel been provided with sufficient funds. This motion was denied.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL, AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Since Powell v. Alabama, 287 U.S. 45 (1932), and Gideon v. Wainwright, 372 U.S. 335 (1963), it has been firmly established that a defendant charged in state court with a serious

crime has a constitutional right under the Sixth Amendment and the due process clause of the Fourteenth Amendment to the "Assistance of Counsel for his defense." This right rests not simply upon the commencement of the criminal trial, but at the very outset of criminal proceedings. Powell, supra, 287 U.S. 45, 57. It is not fulfilled merely by the appointment of an attorney or the presence of an attorney at one's side:

> Despite there being perhaps some salutary effect from the mere presence of a competent attorney available to a defendant in a criminal proceeding, physical presence alone fails to satisfy the mandate of the Sixth Amendment. United States v. Woods, 487 F.2d 1219 (5th Cir., 1973).

Rather, the Sixth Amendment guarantee is satisfied only when an accused is provided "effective counsel" -- that is, "counsel reasonably likely to render, and rendering, reasonably effective assistance" [emphasis in original]. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir., 1960), modified on other grounds and affirmed en banc, 289 F.2d., 928 (5th Cir., 1961), cert. den., 368 U.S. 877 (1961).

The guarantee of counsel "reasonably likely to render and rendering effective assistance" (the "MacKenna standard") has been reaffirmed so consistently and so many times in the Fifth Circuit that it has become the idiomatic formulation of the Sixth Amendment standard. See, e.g., Easter v. Estelle, 609 F.2d 756, 759 (5th Cir., 1980); Fitzgerald v. Estelle, 505 F.2d 1334, 1338 (5th Cir., 1974), cert. den. 422 U.S. 1011 (1975); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir., 1974).

Whenever a person has been convicted of a capital offense, the conduct of his counsel must be strictly scrutinized. Smotherman v. Beto, 276 F.Supp. 576, 586 (N.D. Tex., 1967).

This is necessiated by the understanding, expressed by the Supreme Court of the United States in Gardner v. Florida, 430 U.S. 349 (1977), that death is different from other forms

of punishment:

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reasons rather than caprice or emotion. 430 U.S. 349, 357-58.

Effective assistance of counsel in a capital case must be assessed with respect to two proceedings which together comprise the defendant's "trial." In the wake of Furman v. Georgia, 408 U.S. 238 (1972), death penalty statutes in Georgia and other states were modified in order to fashion a proceeding that was intended to provide statutorily guided discretion in capital sentencing. Ga. Code Ann. §26-3102.

For the assistance of counsel to be effective in a capital case, it must be demonstrably effective in both the guilt/innocence phase and the sentencing phase of the trial. The quality of representation afforded during the penalty stage of Petitioner's trial must be considered in the light of the holding of the Supreme Court of the United States that,

> [I]n capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence. Gregg v. Georgia, 428 U.S. 153, 189 n. 38 (1976) [emphasis added].

This Court has explained minimum requirements for the fair determination of a sentence of death in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a desig-

> nated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> While the practice of individualizing sentencing determination generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect of humanity underlying the Eighth Amendment [citation omitted] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

See, also, Lockett v. Ohio, 438 U.S. 586 (1978). The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel. A substantial failure to obtain and present such information plainly constitutes ineffective assistance of counsel. See, Mason v. Balkcom, 531 F.2d 717, 724 (5th Cir., 1976); United States v. Pinkney, 551 F.2d 1241, 1248 (D.C. Cir., 1976).

Even in non-capital cases, counsel has a clear and universally recognized obligation to present to the sentencing authority evidence of all relevant circumstances of the background and character of the defendant, and a failure to meet this obligation jeopardizes a defendant's Sixth Amendment rights.

Counsel is ineffective, furthermore, "if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1227 (5th Cir., 1979). It is the duty of counsel to interview potential witnesses and to make an independent examination of the factual circumstances and law involved. United States v. Johnson, 615 F.2d 1125 (5th Cir., 1980); Rummel v. Estelle, 590 F.2d 103 (5th Cir.), cert. granted, 441 U.S. 960 (1979).

II. PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, MEANINGFUL ACCESS TO THE COURTS, AND COMPULSORY PROCESS, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE DENIAL BY THE STATE HABEAS CORPUS COURT OF PETITIONER'S MOTION FOR FUNDS FOR EXPERT ASSISTANCE.

It is "established beyond a reasonable doubt that prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817 (1977). This right, which insures that incarcerated persons have a fair opportunity to present their claims to the courts, has been recognized by this Court in a number of decisions which have struck down procedures which effectively limit a prisoner's chance to have his claims heard. See, Ex Parte Hull, 312 U.S. 546 (1941); Griffin v. Illinois, 351 U.S. 12 (1956); Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. California, 372 U.S. 358 (1963); Johnson v. Avery, 393 U.S. 483 (1969); Procunier v. Martinez, 416 U.S. 396 (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); Bounds v. Smith, supra.

This right of access to the courts has two essential components. The first is that barriers which restrict a prisoner's effective preparation of his constitutional claims must be removed. Thus, for example, in Johnson v. Avery, supra, this Court struck down a regulation prohibiting prisoners from assisting one another in the preparation of habeas corpus applications and other legal matters. In Procunier v. Martinez, supra, this Court invalidated a prison regulation prohibiting the use of law students and legal para-professionals by attorneys to interview prisoners. "Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Id., at 419. And in Bounds v. Smith, supra, the state was required either to provide inmates with law libraries

or alternatively to provide professional or quasi-professional legal assistance for the research and preparation of petitions in order to give prisoners meaningful access to the courts.

It is not enough, however, that barriers to preparation be removed or that an inmate have a formal right to file pleadings and papers. The second component of the right of access to the courts is that the access afforded a prisoner must be meaningful. If a particular instrument or means of assistance is necessary to make the legal proceeding meaningful, moreover, this instrument may not be denied to prisoners simply because they are without the financial means to pay for it. For "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42 (1967). The state is required to make available the "basic tools of an adequate defense or appeal," Britt v. North Carolina, 404 U.S. 226, 227 (1971), to those incarcerated persons unable to pay. For example, in Griffin v. Illinois, supra, the Supreme Court of the United States held that because a defendant could not obtain an "adequate and effective appellate review" without a trial transcript, the state must provide trial records to inmates unable to buy them. In Douglas v. California, supra, this Court held that counsel was essential for an inmate to have a meaningful appeal fron his convictions, and therefore, counsel must be appointed for those prisoners unable to retain an attorney. Furthermore, an indigent defendant must not be forced to pay a filing fee as a prerequisite for an appeal, Burns v. Ohio, supra, Douglas v. Green, 363 U.S. 192 (1960); or for a habeas corpus petition, Smith v. Bennett, supra. See, also, Mayer v. City of Chicago, 404 U.S. 189 (1971); Williams v. City of Oklahoma City, 395 U.S. 458 (1969); Rinaldi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Board of Prison Terms and

Paroles, 357 U.S. 214 (1958).

Under these decisions the state is required "to shoulder affirmative obligations" so that all prisoners are afforded a meaningful opportunity to present their claims. Bounds v. Smith, supra. "The right of access to the courts ... assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell, supra, at 579.

Failure in the present case to provide Petitioner with funds for expert assistance violated both components of the constitutional right of access to the courts, for it created a de facto barrier to Petitioner's assertion of his constitutional claims and rendered meaningless the formal access afforded him.

The record is unchallenged that Petitioner himself is presently indigent. Roosevelt Green clearly is incapable of defending himself against capital charges.

Unless he is afforded "the guiding hand of counsel," Powell v. Alabama, supra, at 69, to press his state habeas corpus claims, Petitioner faces what amounts to an impenetrable barrier to relief.

The constitutional right of access to the courts applies not only at trial and on direct appeal, but also during post-conviction proceedings.

Whatever the constitutional obligation of a state might be to provide post-conviction remedies to state prisoners, it is clear that once a system of post-conviction relief has been adopted, it must be administered to provide a full and fair hearing to state prisoners.

This Court, in an extended line of cases, has reversed and remanded state court decisions in which prisoners' post-conviction claims had been rejected without such a hearing. See, Pyle v. Kansas, 317 U.S. 213 (1942); Pennsylvania ex rel. Hermann v. Clardy, 350 U.S. 116 (1955); Sublett v. Adams, 362 U.S. 143 (1960); Wilde v. Wyoming, 360 U.S. 607 (1960); McNeal

v. Culver, 365 U.S. 109 (1961); Bushnell v. Ellis, 366 U.S. 418 (1961). As Mr. Justice Powell recently reminded the state courts in Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (concurring opinion): "It is the solemn duty of ... (state) courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law." See also, Stone v. Powell, 428 U.S. 468, 495 n. 35 (1976); Case v. Nebraska, 381 U.S. 336, 344-45 (1965) (Brennan, J. concurring).

Further, access to full and fair post-conviction procedures cannot be limited by economic barriers that have no rational relationship to the merits of the legal claims thought to be biased. Discrimination "based upon indigency alone," Lane v. Brown, 372 U.S. 477, 485 (1963) is impermissible. Eskridge v. Washington State Board of Prison Terms and Paroles, supra; Ross v. Schneckloth, 357 U.S. 575 (1958); McCrary v. Indiana, 354 U.S. 277 (1960); Smith v. Bennett, supra; Long v. District Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, 395 U.S. 925 (1969).

The Court, in Johnson v. Avery, supra, Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal.), aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971), and in Bounds v. Smith, supra, has established irrefutably that "for the indigent as well as the affluent prisoner, post-conviction proceedings must be more than a formality." Johnson v. Avery, 393 U.S., at 486. In striking down the State of Tennessee's prison regulation which prohibited its inmates from assisting one another in the filing of state or federal post-conviction writs, the Court in Johnson held that the impact of the State's regulation "was to unconstitutionally forbi(d) illiterate or poorly educated prisoners to file habeas corpus petitions." 393 U.S., at 487. "Johnson v. Avery ... makes it clear that provision must be made to

insure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the court." Gilmore v. Lynch, supra, at 110.

The importance of meaningful access to post-conviction proceedings was underscored by this Court in Bounds v. Smith, supra, when the Court declared that such prisoner petitions "are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review." Id., at 827-828.

Any distinction of habeas corpus as a "civil" rather than a "criminal" proceeding is artificial and cannot act to deprive Petitioner of the assistance of counsel.

The Georgia habeas corpus procedure is a procedure which Petitioner must utilize and complete before he can petition in a United States District Court for a writ of habeas corpus.

The procedure in a United States District Court is set forth in a law enacted by Congress, 28 U.S.C. §2254, which provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented.

The state habeas corpus procedure may finally determine Fourth Amendment claims, Stone v. Powell, supra, and may very

well be determintive of and foreclose consideration of other substantial issues in the federal proceedings because "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction ... shall be presumed to be correct ..." in the federal proceeding. 28 U.S.C. §2254 (d).

The function of the Georgia habeas corpus procedure as a means of determining constitutional claims in criminal cases is made clear by the Legislature's statement of legislative intent included with 1967 Ga. Laws, p. 835, et. seq., a complete revision of the habeas corpus statute:

> Section 1. Statement of Legislative Intent and Purpose.
>
> The General Assembly finds that expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court, together with other decisions of said court (a) substantially curtailing the doctrine of waiver of constitutional rights by an accused and (b) limiting the requirement of exhaustion of state remedies to those currently available, have resulted in an increasingly larger number of state court convictions being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by the courts of this State, that such increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights, with a resultant deterioration of the federal system and federal-state relations; that to alleviate said problems, it is necessary that the scope of state habeas corpus be expanded and the state doctrine of waiver of rights modified. The General Assembly further finds that expansion of state habeas corpus to include many sharply-contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases.

The requirement that access to the courts be meaningful takes on special significance in the context of an indigent person who has been sentenced to death. In death cases, courts must be "particularly sensitive to see that every safe-

guard is observed." Gregg v. Georgia, supra, at 187. Indeed, when a person's life is at stake, higher standards of regularity and fairness are required. The Supreme Court of the United States has consistently held that constitutional protections are particularly exacting in death cases. See, e.g., Powell v. Alabama, supra, at 71-72; Stein v. New York, 346 U.S. 156, 196 (1953); Williams v. Georgia, 349 U.S. 375, 391 (1955); Reid v. Covert, 354 U.S. 1, 45-46 (1957) (concurring opinion of Frankfurter, J.); Id. at 77 (Concurring opinion of Harlan, J.).

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra, at 305; See also, Gardner v. Florida, supra, at 357-358.

The obligation of the State of Georgia to ensure meaningful access to the state habeas corpus court must be evaluated in terms of the more stringent safeguards demanded when the state seeks the death penalty against a person.

Furthermore, without necessary funds for the assistance of an investigator, Petitioner was unable to exercise his right to locate and subpoena witnesses in his favor. "The right to offer the testimony of witnesses and to compel their attendance if necessary ... is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also, Webb v. Texas, 409 U.S. 95 (1972).

As this Court has stated concerning the companion Sixth Amendment right to confront witnesses, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that any competing state interest be closely examined. See, e.g., Barker v. Page, 390 U.S.

719 (1968); Burger v. California, 393 U.S. 314 (1969). The only state interest which can be offered by the State of Georgia to justify the limitations on funds for expert assistance in state habeas corpus proceedings is the lessening of the costs.

CONCLUSION

For the reasonsshown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

ROOSEVELT GREEN,	*	
	*	
PETITIONER	*	
	*	
vs	*	HABEAS CORPUS NO. 5107
	*	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	*	
	*	
	*	
	*	
RESPONDENT	*	

PETITION FOR A WRIT OF HABEAS CORPUS, FOR A STAY OF EXECUTION, AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

FINDING OF FACT AND CONCLUSION OF LAW

This is a Petition for Writ of Habeas Corpus to relieve the Petitioner, ROOSEVELT GREEN, of restraint under a conviction and sentence of death imposed upon him by the State of Georgia. The Court finds that he is presently imprisoned in the Georgia Diagnostic and Classification Center at Jackson, Georgia. That Walter D. Zant is the Warden of the Georgia Diagnostic and Classification Center in Jackson, Georgia. In that capacity, he has the custody of the Petitioner. Respondent Zant is charged by the laws of the State of Georgia with carrying out the execution of Petitioner's sentence of death, and Respondent is presently confining Petitioner for that purpose. That on January 28, 1978, Petitioner was convicted in the Superior Court of Monroe County, Flint Judicial Circuit, of the offense of murder. By a final judgment entered on January 28, 1978, Petitioner was sentenced to death upon the murder conviction. On September 8, 1978, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence of death. On September 28, 1978, the Court denied a timely Motion for Rehearing. On December 27, 1978, Petitioner tendered for filing a Petition for a Writ of Certiorariin the Supreme Court of the United States.

EXHIBIT A
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The Court granted certiorari, and on May 29, 1979, reversed the Supreme Court of Georgia and the Trial Court as to the sentencing phase of the trial.

The Court further finds that on November 5, 1979, a resentencing trial commenced in the Superior Court of Monroe County, Flint Judicial Circuit. On November 10, 1979, Petitioner was again sentenced to death for the crime of murder. On October 8, 1980, the Supreme Court of Georgia affirmed the Petitioner's second sentence of death. No Motion for Rehearing was filed. Green v. Georgia, 246 Ga. 593, 272 S. E. 2d 475 (1980). On January 5, 1981, Petitioner tendered for filing a Petition for Writ of Certiorari in the Supreme Court of the United States. On February 23, 1981, the Court denied certiorari. A timely Motion for Rehearing was filed and denied on April 20, 1981. On May 29, 1981, the Superior Court of Monroe County, Flint Judicial Circuit, set June 15, 1981, as the date for the execution of Petitioner's sentence of death.

The Petitioner then filed this Writ of Habeas Corpus in the Superior Court of Butts County. The Motion for Stay of Execution was denied and the Writ of Habeas Corpus was dismissed on June 11, 1981. Upon Application for Certificate of Probable Cause to appeal the dismissal of Petition of Habeas Corpus; it was Ordered by the Supreme Court of Georgia, that the case be remanded to the Habeas Corpus Court for a hearing of the issues presented in the Petition.

The matter then came on for a hearing before this Court on August 10, 1981 in Butts Superior Court. The Writ is in twenty-eight counts with numerious sub counts, many of which were never discussed in oral argument or written brief filed with the Court. After reviewing the record, of the first and second trials together with the record in this Writ of Habeas Corpus hearing together with affidavits and briefs the Court finds there is no evidence contained in the record or law cited in brief to

"A" P. 2

sustain the allegation contained in counts, 1, 2, 3, 5, 7, 8, 9, 10, 12, 13, 15, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, 28, these grounds were apparently waived since they were not insisted upon in argument or briefs. In connection with count, 4, 6, 11, 14, 18, 20 the Court finds Defendant was represented at the first trial by one capable attorney and three capable attorneys during the second trial, which was for the purpose of fixing punishment. The record reflects the fact that counsel very capably interviewed witnesses, investigated facts, including spending considerable time with the Defendant. The Defendant's counsel had the cooperation of the District Attorneys office, Crime Laboratory and Court so far as the making available to the Defendant all States evidence. There is no evidence to support the allegation that counsel failed to obtain and to present available mitigating testimony. The only evidence it is now suggested the Defendant was unaviable to have was that of some Father James, which is even now indefinate, questionable and repetitive of other available evidence.

The Court made a proper investigation of a sick juror who had an epiliptic seizure during the deliberation of the jury as reflected by the record at page 1,136 and replaced this juror with the first alternate. This was a matter that addressed itself to the discretion of the Judge and his actions were proper exercise of those discretions.

Trial counsel need not file a challenge to the jury unless there is some basis for doing so, and counsel in this case testified that he and co-counsel were convinced that the jury was not subject to challenge. Even now no evidence of any nature is offered to show that the jury was subject to challenge.

The question of security in the courtroom addresses itself to the Sheriff and to the Court, and has already been

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approved by the Supreme Court of Georgia in this case.

There is no evidence that additional funds could have produced any valuable or helpful evidence and the State is not required to furnish money for research or fishing expeditions.

JUDGMENT

IT IS THEREFORE ORDERED that the Writ of Habeas Corpus be and the same is hereby DENIED on each and every ground.

Grounds of complaint in the application for relief on Habeas Corpus have been considered and are determined to be without merit. There has been no denial or any of Petitioner's constitutional rights. The Court finds no merit in Petitioner's application and relief is expressly denied upon each and every ground thereof. Petitioner is remanded to the custody of the Department of Offender Rehabilitation.

Therefore, the sentenced previously imposed stands in full force and effect, and no legal reason exists to bar the execution of the sentence.

It is further Ordered that said officials of the State shall execute Defendant by electrocution as provided by law, and witnessed only by the executing officers under Code Section 27-2515, Defendant's relatives, counsel, and such clergymen and friends as Defendant may desire.

The execution shall take place at Georgia Diagnostic and Classification Center on October 5, 1981, between the hours of ten o'clock, A.M. and four o'clock, P.M.

IT IS SO ORDERED this the 8 day of September 1981.

H. LAMAR KNIGHT,
SENIOR JUDGE,
GEORGIA STATE AT LARGE

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APPENDIX B

Application No. 1828

SUPREME COURT OF GEORGIA

ATLANTA, November 5, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROOSEVELT GREEN V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX B

APPENDIX C

GEORGIA CODE PROVISIONS

Georgia Code Annotated §24-4526

Appeals of Habeas Corpus After Criminal Convictions.

When Applications Granted: An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated §50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record.

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

(1) Grounds for writ.--
Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--
The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, and clearly set for the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

APPENDIX "C"

(3) Jurisdiction and venue.--
The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior court of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.--
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Correction, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--
Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--
Within 20 days after filing and docketing of the petition, or within further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.--
(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.
(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.
(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the sate set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.
(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--
All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--
After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of law shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--
All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--
(a) Appeals in habeas corpus cases shall be governed by the Appellate Procedure Act of 1965 [§6-701, et seq.], except that as to final orders of the court which are adverse to petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and

and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

Georgia Code Annotated §26-3102

Capital offenses; jury verdict and sentence.

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in the offenses of treason and aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty. (Acts 1968, pp. 1249, 1335; 1969, p. 809; 1973, pp. 159, 170).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-

81 5935

ROOSEVELT GREEN,

Petitioner,

-v-

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, ROOSEVELT GREEN, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46. Mr. Green's Affidavit in support of this motion will be forwarded to the Court as soon as it is received by counsel.

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